

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

ALLAN WAGAMON, et al.,)
)
 Petitioners,)
)
 v.) C. A. No. 5594-MG (Consolidated)
)
DAVID B. DOLAN, et al.,)
)
)
 Respondents.)

MASTER’S FINAL REPORT
(Motion to Dismiss)

Date Submitted: October 19, 2010
Draft Report Issued: January 26, 2011
Final Report Issued: February 17, 2011

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Attorneys for Plaintiffs.

Davis B. Dolan, pro se, Defendant.

GLASSCOCK, Master

This consolidated matter concerns the winding-up of InterNetworking Technologies, Inc. (“INT”), a joint venture corporation owned by David B. Dolan and Allan Wagamon. Wagamon filed a complaint seeking dissolution of the corporation under 8 Del. C. § 273. In a separate action, Dolan filed a complaint and an amended complaint, seeking various remedies relating to INT. Those matters were consolidated under this Civil Action. Wagamon has moved to dismiss the Dolan complaint; this is my report on the Motion to Dismiss.

Facts

The following facts (except as noted) are alleged in the Dolan complaint. Dolan began the business now known as INT in 1995. In 1996, Wagamon joined Dolan as a partner in the business, and INT was incorporated. Each partner owns 50% of the corporation, which provided computer infrastructure management, networking and repair.¹ In 2008, Dolan was convicted of felony offenses and sentenced to 17 years imprisonment. Following Dolan’s incarceration, Wagamon started a new business, Wagamon Technology Group, LLC (“WTG”). Wagamon has diverted assets of INT to WTG. William Kreig, an accountant for INT, has assisted Wagamon in this transfer of assets and in producing a valuation of INT which severely understates its actual value, which Wagamon has used as a basis to attempt to buy out Dolan’s interest.

¹ Wagamon complaint, at ¶¶ 3, 4.

Based upon these allegations, Dolan seeks declaratory judgment that the actions of Wagamon and Kreig (the “Wagamon defendants”) are unlawful; injunctive relief barring the dissolution of INT; compensatory and punitive damages; and the appointment of a receiver to wind up the affairs of INT. The defendants seek dismissal² of Dolan’s complaint³ under Rule 12.

Standard

The standard for a motion to dismiss under Rule 12 (b)(6) is well known. I must accept the well-pled factual allegations of the complaint, together with any reasonable inferences therefrom, as true. Only where it appears that the plaintiff cannot prevail as a matter of law, based upon those facts and inferences, is the movant entitled to a dismissal. Chancery Court Rules, Rule 12 (b)(6); *see, e.g., Carmody v. Toll Bros., Inc.* Del. Ch., 723 A.2d. 1180, 1184 (1998).

² The defendants named in the Dolan complaint (Wagamon, Kreig and WTG) have moved collectively to dismiss for failure to state a claim. The primary allegations of the complaint are against Wagamon. Therefore, I have considered the complaint to see if Dolan has pled a claim generally; and I have not considered whether the complaint states a cause of action against Kreig or WTG, individually.

³ Dolan filed a request to amend the complaint, and before that request was acted upon, the motion to dismiss the complaint was filed by Wagamon. Dolan then sought leave to file a second amended complaint. For the sake of efficiency, given my decision here, I grant the request to file the second amended complaint, and I have addressed the allegations of that complaint with regard to the motion to dismiss.

Discussion

A. The Constitutional Claims.

Dolan seeks a declaratory judgment that the actions of Wagamon, Kreig and WTG “have denied Dolan his Constitutional rights to due process of law guaranteed in Amendments V, XIV [of the United States Constitution].” The complaint fails to allege any state action, however. Dolan’s allegations are limited to actions of Wagamon and Kreig as private citizens. Accordingly, Dolan’s claims based on denial of due process must be dismissed. *E.g.*, Swanson v. Wesley College, Inc., Del. Super., 402 A.2d 401, 403 (1979).

Dolan also alleges that Wagamon’s actions have deprived him of rights under Section 10 of Article IV of the Delaware Constitution of 1897. That section simply provides for the composition and jurisdiction of this Court; it does not provide an independent cause of action. Accordingly, Dolan’s claims under the Delaware Constitution must be dismissed.

B. Dolan’s Claims Under Title 8 of the Delaware Code.

Dolan’s complaint states that the actions of Wagamon “have violated the laws of the State of Delaware-inclusive of but not limited to:” numerous Delaware statutes.⁴

⁴ Dolan alleges the violation of the following sections of the Delaware Code, Chapter 8, Section 101; Chapter 8, Section 144; Chapter 8, Section 151(a), (b)(2), (c), (d), (e); Chapter 8, Section 170(a); Chapter 8, Section 203; Chapter 8, Section 212(a), (c); Chapter 8, Section 216; Chapter 8, Section 220(b); Chapter 8, Section 226(a)(1), (2), (3); Chapter 8, Section 251(a); Chapter 8, Section 254; Chapter 8, Section 266(a), (b); Chapter 8, Section 271(a); Chapter 8, Section 273(a); Chapter 8, Section 275(a), (b), (c); Chapter 8, Section 282(a), (b), (c); Chapter 8, Section 325(a). Dolan’s complaint at ¶27.

Dolan is proceeding pro se in this matter. Nevertheless, he is bound to follow the pleading requirements of this Court, which require “a short and plain statement of the claim showing that the pleader is entitled to relief.” Court of Chancery Rules, Rule 8(a). Here, Dolan has simply recited numerous sections of the Delaware General Corporation Law without attempting to describe how the actions of the Wagamon defendants have violated these code sections and given rise to a cause of action on behalf of Dolan. Dolan’s complaint in this regard is purely conclusory. Moreover, Dolan has declined to attempt to clarify these claims in briefing on this motion. Therefore, Dolan’s conclusory statutory claims must be denied, without prejudice. *See, MicroStrategy, Inc. v. Acacia Research Corp.*, Del. Ch., No.5735, Parsons, V.C. (December 30, 2010)(Mem. Op.) at 3. That must not end my analysis, however. I turn to the substantive factual allegations of Dolan’s complaint to see whether he has stated a claim for injunctive relief or for compensatory damages.⁵

C. Dolan’s allegations of conversion and breach of duty.

Dolan’s substantive allegations are that Wagamon has not permitted him to participate in the business of INT since his incarceration; that he has not received his share of corporate distributions since his incarceration; that Wagamon and Kreig have improperly valued INT and that Wagamon has offered to acquire Dolan’s share in INT for an “unconscionable” price; and that Wagamon and Kreig have converted assets of

⁵ Dolan’s complaint also seeks punitive damages, but punitive damages are not available (absent specific legislation to the contrary) in this Court. *E.g., Adams v. Calvarese Arms Maintenance Corp.*, Del. Ch., No. 4262, Parsons, V.C. (September 17, 2010)(Mem. Op.) at 21, n. 204.

INT to WTG and have encumbered INT with debt to reduce its value, rather than for a proper purpose. Broadly, Dolan alleges that Wagamon and Kreig have failed in their fiduciary duties to him and to INT.

Wagamon argues that these claims belong to INT, and not Dolan individually. Because Dolan has not attempted to bring this action derivatively, on behalf of INT, these claims, according to Wagamon, must be dismissed. In addition to being owners of INT, however, Dolan and Wagamon are joint venturers. Joint venturers stand in a fiduciary relationship to one another; and a breach of that duty constitutes an individual claim. In re Arthur Treacher's Fish & Chips of Ft. Lauderdale, Inc., Del. Ch., 386 A.2d 1162, 1167 (1978). The breach of duty claims are made in the context of a request by Wagamon to dissolve INT. While Dolan's complaint seeks to enjoin the dissolution of INT, it appears that the injunction request is only addressed to dissolution under Wagamon's proposed plan. In fact, Dolan asks that a Master be appointed to wind-up the affairs of INT.

It is abundantly clear from the pleadings in this matter that INT was a joint venture, that Dolan can no longer participate in the joint venture due to his incarceration, that the cause of that incarceration has led to an irreparable rupture of the business relation between Dolan and Wagamon and that either stockholder is entitled to a dissolution under 8 Del. C. § 273(a). Dolan's allegations that Wagamon breached his fiduciary obligations by undermining the value of INT, and by converting assets from it to WTG, are factors that may be considered in the wind-up and distribution of the assets of INT, as well as via Dolan's free-standing complaint. *See, In re Arthur Teacher's*, 386

A.2d at 1167. Therefore, the Wagamon defendants' request to dismiss the fiduciary and conversion claims must be denied.

Conclusion

For the reasons stated above, Dolan's constitutional claims are dismissed with prejudice. His statutory claims are dismissed without prejudice. The motion to dismiss that portion of the complaint stating a claim for conversion and breach of duty is denied. The parties should inform me within 20 days what reasons exist, if any, indicating that the Court should not appoint a trustee to gather the assets of INT and wind-up its affairs.

/s/ Sam Glasscock, III
Master in Chancery